

What is rule of law backsliding?

VB verfassungsblog.de/what-is-rule-of-law-backsliding/

Kim Lane Scheppele , Laurent Pech Fr 2 Mrz 2018

Fr 2 Mrz 2018

There is no official definition of rule of law backsliding although the expression can be found in official literature. In light of the pattern of constitutional capture (an expression coined by [Professor Müller](#)) which has materialised in what seems to be an increasing number of countries in the past decade or so, we recently proposed to define rule of law backsliding in [this article](#) as “the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party”.

The notion of backsliding implies that a country was once better, and then regressed. A key feature of this process of weakening checks and balances is that it reflects a deliberate strategy of a ruling party, the (unadvertised) goal being to establish electoral autocracies (with elections possibly “free” but no longer “fair”) and the progressive solidification of de facto one-party states.

Would-be-autocrats invariably target what one may call democratic rules and institutions more broadly and therefore “rule of law backsliding” may also be possibly labelled “democratic backsliding”, which is the expression used for instance by International IDEA in its [2017 Global State of Democracy](#). The bottom line however remains the same: “Modern backsliding can take place though the manipulation of democratic rules and institutions. Constitutions and electoral rules can be used to favour a ruling party and limit the independence and power of the judiciary and the media”.

To speak of “illiberal democracy” in this context is deeply misguided and unhelpful as it “provides a sense of philosophical sophistication to something that is better described as a power grab”. In a recent [article](#) of ours, we spoke of a recipe or blueprint for constitutional capture which follows a well-organised script that we summarised as follows:

- i) Rule of law backsliding tends to begin with a significant number of citizens losing faith in their system of government for reasons which vary from increasing inequality, persistent unemployment or the predatory practices of the ruling elites. This is often accompanied by a crisis in the party system in which at least one of the mainstream parties is either riven with conflict or takes a sharp turn to an extreme which then presents itself as a normal option at the next election;
- ii) Disgruntled citizens vote to break the system by electing a leader who promises radical change, often referring to the “will of the people” while attacking the pre-existing constitutional framework with cleverly crafted legalistic blueprints borrowed from other ‘successful’ autocrats;

- iii) The new autocrats act quickly to disable or take over the key offices that might resist their consolidation of power, which includes the independent judiciary, the media and the repressive institutions (security services, police, public prosecutor's office);
- iv) To remain popular, these autocrats engage in benefit giveaways while they seek to control the public debate and eliminate alternative views through the bullying of civil society groups and the deployment of newly captured tax police and public prosecutors against their opponents;
- v) They then change the election law, the electorate (by pushing the opposition out of the country or suppressing their votes) or both;
- vi) When voters eventually wake up to the damage done (usually too late, as the new autocrat has by that time destroyed any channel through which alternative views may be expressed), they have few options to resist because their constitutional system has been captured and no constitutional avenue remains to effectively challenge the government/ruling party;
- vii) In the unlikely situation where resistance nonetheless emerges from the Parliament or from the streets, biased referenda can always be organised to confirm the will of the leader under the guise of the will of 'the people', a notion which authoritarian populists find useful to rely upon in order to put themselves "above democratic institutions and to overcome obstacles" which may stand in their way;
- viii) Having sealed the space against dissenting voices and rewritten electoral regulations, autocrats can then expect to get the votes they need to win subsequent elections by whipping up imaginary enemies or giving away state largesse to garner votes. In this way, the rotation of power from one party to another becomes a feature of the past.

Faced with "the systematic disabling of checks and balances in constitutional orders by a new generation of elected but autocratic leaders", EU institutions have struggled to cope with this new and unexpected challenge as the assumption has long been that pre-accession checks would guarantee that no country would be admitted to the EU club unless it had already reached the stage of a sustainable democratic regime based on the rule of law, an accomplishment that appeared to preclude backsliding.

Numerous factors explain the relatively late realisation by EU institutions of the problem it was facing, one of which is the new autocrats' practice of scanning "the horizon for the worst practices from good states and adopt[ing] them. Because the practices are from good states, autocrats can claim double standards if they are criticized".

In addition to being in denial about the nature and gravity of the problem, a number of key actors have also been willing to countenance a number of far-fetched legal arguments which have been raised by "autocratic legalists" to borrow the expression coined by Professor Scheppele. These arguments will be dealt in our Question 4 and Question 5. First, however, we will explain in our next Q&A why the EU should be concerned when there is constitutional capture going on inside an EU Member State.

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Scheppele, Kim Lane; Pech, Laurent: *What is rule of law backsliding?*, *VerfBlog*, 2018/3/02, <https://verfassungsblog.de/what-is-rule-of-law-backsliding/>.